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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/014,977	12/10/2001	Michael Evan Webber	260/289	3321
34026	7590	06/05/2003		
JONES DAY 555 WEST FIFTH STREET, SUITE 4600 LOS ANGELES, CA 90013-1025			EXAMINER	
			NASSER, ROBERT L	
			ART UNIT	PAPER NUMBER
			3736	
DATE MAILED: 06/05/2003				

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No. 10/014,977	Applicant(s) Webber
Examiner Robert Nasser	Art Unit 3736



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

1)  Responsive to communication(s) filed on \_\_\_\_\_

2a)  This action is FINAL.      2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

### Disposition of Claims

4)  Claim(s) 1-42 is/are pending in the application.

4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-42 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are a)  accepted or b)  objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.

12)  The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

13)  Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All b)  Some\* c)  None of:

1.  Certified copies of the priority documents have been received.
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\*See the attached detailed Office action for a list of the certified copies not received.

14)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a)  The translation of the foreign language provisional application has been received.

15)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

1)  Notice of References Cited (PTO-892)      4)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_

2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)      5)  Notice of Informal Patent Application (PTO-152)

3)  Information Disclosure Statement(s) (PTO-1449) Paper No(s). 4      6)  Other: \_\_\_\_\_

Art Unit: 3736

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 4-6, 8, 10, 11, 13, 14, 17, and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Kiefer et al. Kiefer et al shows an breath alcohol monitoring device that takes a breath sample, monitors the carbon dioxide concentration in the sample, and compares the concentration to a threshold. When the carbon dioxide concentration exceeds the threshold, Kiefer et al indicates that true lung, or alveolar air, is present in the sample and triggers a measurement of alcohol concentration. The threshold for carbon dioxide concentration is 4.5%.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2, 3, 12, 16, 20-25, 27-29, 31-37, 39, 40, and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Forrester et al. Kiefer et al does not have optical or spectrophotometric measurements for either the alcohol or the carbon dioxide. Forrester et al shows a similar measuring device for measuring alcohol in deep lung or alveolar air, which measures both the carbon dioxide and alcohol optically with two different wavelengths. Hence, it

Art Unit: 3736

would have been obvious to modify Kiefer et al to use optical measuring techniques, as it is merely the substitution of one known measuring technique for another. The examiner notes that the measuring paths of the light are substantially similar. The combination does not multiplex the optical signals, but takes official notice that it is well known to measure two parameters in this manner. Hence, it would have been obvious to modify the above combination to multiplex the signals, as it is merely the substitution of one known measuring technique for another.

Claims 7 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kiefer et al in view of Culver et al. Kiefer et al does not update the threshold based on previous measurements for the patient. Culver et al teaches such a technique to tune the device to the specific patient. Hence, it would have been obvious to modify Kiefer et al to update the threshold based on previous measurements, so as to make the operation more accurate.

Claims 9 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gustafsson et al in view of Kiefer et al. Gustafsson et al measure nitric oxide in alveolar breath optically. It does not include a method or device to ensure that Alveolar air only is obtained. Hence it would have been obvious to incorporate the teachings of Kiefer et al into the method of Gustafsson to ensure that alveolar air is obtained and that the readings are accurate.

Claims 26 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kiefer et al in view of Forrester et al, as applied to claims 2, 3, 12, 16, 20-25, 27-29, 31-37, 39, 40, and 42 above, further in view of Culver et al. The above combination does not update the threshold based on previous measurements for the patient. Culver et al teaches such a technique to tune the

Art Unit: 3736

device to the specific patient. Hence, it would have been obvious to modify the above combination to update the threshold based on previous measurements, so as to make the operation more accurate.

Claims 30 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gustafsson et al in view of Kiefer et al and Forrester. Gustafsson et al measure nitric oxide in alveolar breath optically. It does not include a method or device to ensure that Alveolar air only is obtained. Hence it would have been obvious to incorporate the teachings of Kiefer et al and Forrester et al into the method of Gustafsson to ensure that alveolar air is obtained and that the readings are accurate.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Heim et al, Elfman et al, Ueda et al, and Koppel et al all show devices for ensuring that the measurement of a breath sample is made on alveolar air.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert L. Nasser Jr. whose telephone number is (703) 308-3251. The examiner can normally be reached on Monday-Thursday and alternate Fridays from 8:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg, can be reached on (703) 308-3130. The fax phone number for this Group is (703) 308-0758.

Communications via Internet e-mail regarding this application, other than those under 35 U.S.C. 132 or which otherwise require a signature, may be used by the applicant and should be addressed to [max.hindenburg@uspto.gov].

All Internet e-mail communications will be made of record in the application file. PTO employees do not engage in Internet communications where there exists a possibility that sensitive information could be identified or exchanged unless the record includes a properly signed express waiver of the confidentiality requirements of 35 U.S.C. 122. This is more clearly set forth in the

Art Unit: 3736

Interim Internet Usage Policy published in the Official Gazette of the Patent and Trademark on February 25, 1997 at 1195 OG 89.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0858.

RLN

April 29, 2003

*Robert L. Nasser*  
ROBERT L. NASSER  
PRIMARY EXAMINER